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No. 927

In the Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL TRADE COMMISSION, *Petitioner*,

vs.

SUPERIOR PORTLAND CEMENT, INC.,

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 16761) is reported in 157 F.(2d) 533.

JURISDICTION

Jurisdiction is set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission has failed to find the existence of a national conspiracy to restrain competition in price on sales of cement between states and whether there is a lack of any substantial evidence upon which the Commission could make such a finding.

2. Whether the Federal Trade Commission has

failed to find that Superior Portland Cement, Inc. is a party to a national conspiracy as described in question 1, and whether there is a lack of any substantial evidence upon which the Commission could make such a finding.

STATUTES INVOLVED

The Statutes involved are set forth in the Petition for Writ of Certiorari.

STATEMENT

The Statement of Facts in the Petition for Writ of Certiorari is, in many respects, incorrect and is so incomplete as to give an erroneous impression of the case. To state the facts adequately would unduly extend this Brief in Opposition. We adopt and rely upon the Statement of Facts in the other Briefs in Opposition filed in these cases.

This Respondent, Superior Portland Cement, Inc., markets cement only in the western part of the State of Washington, and because of factual differences between its marketing practices and those in other parts of the country has maintained a separate defense throughout this proceeding.

ARGUMENT

1. No substantial question exists as to the correctness of the decision below that no national conspiracy was found by the Commission and that there was no evidence upon which the Commission could properly so find.

Impliedly admitting that there is no finding of national conspiracy, the Petition for Writ of Cer-

tiorari (p. 17) argues that a finding of national conspiracy to sell on the "multiple basing point system" may be inferred from findings that Respondents combined to prevent marketing practices which might impair the function of the pricing system. But the lack of essential findings cannot be remedied by inference. *Wichita Railroad & L. Co. v. Public Utilities Commission*, 260 U.S. 48, 59, 67 L. ed. 124, 43 Sup. Ct. 51; *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510-511, 79 L. ed. 1023, 55 Sup. Ct. 462.

Moreover, the evidence concerning these alleged practices would not support a finding of national conspiracy, even if made. None of the activities relied upon by the Commission were followed by all Respondents in all parts of the country. (Op. Below, R. 16809). In fact, even the pricing methods generally used in the industry are not used by all Respondents, nor in all parts of the country, nor in all parts of the marketing territory of companies that do use them. (Fdg. 7(m), R. 16000; Fdg. 19, R. 16102-16104; R. 3186-3251). National conspiracy to use a pricing system cannot be built out of such lack of uniformity.

2. The Commission's argument in the Court below came down to the contention that the "multiple basing point system" as used in the cement industry is illegal "per se." (Op. Below, R. 16799, 16815). But this Court has already determined this question in the negative. *Cement Manufacturer's Protective Association v. United States*, 268 U.S. 588, 69 L. ed. 1104, 45 Sup. Ct. 586 (1925). That decision has not been overruled or questioned, but, on the contrary, has recently been cited with approval. *Corn Products Refining*

Company v. Federal Trade Commission, 324 U.S. 726, 89 L. ed. 1320, 65 Sup. Ct. 961.

In the *Cement Manufacturer's Protective Association* case, the question involved was whether common, continuing use, without understandings or agreements, of the pricing methods in general use in the cement industry since 1902 constitutes a restraint of trade. The question here is the same. It is not contended by the Commission that the nature of the pricing methods in general use in the cement industry have changed since the previous decision of this Court. On the contrary, the Commission states that this method of pricing has been self-perpetuating ever since it started in 1902, needing no renewed understandings or agreements. (Fdgs., Par. 7(h), R. 15991; Cf. Op. Below, R. 16781).

The decision below is in accordance with the previous applicable decision of this Court, and no reason exists for this Court to grant Certiorari.

3. Moreover, no matter what the case against other Respondents, no substantial question exists as to the correctness of the decision below dismissing the case as to this Respondent, Superior Portland Cement, Inc. There is no finding connecting this company to any national conspiracy. As the majority of the Court below remarked in analyzing the Findings (R. 16782):

> "Certainly there is not even an inference that the system was used either in California or in Washington in connection with any combination or conspiracy."

The dissenting judge below stated (R. 16821):

> "If the evidence fails to show that one or more

of the defendants is a party to the conspiracy we should dismiss said defendant from the proceedings. We would not for that reason be justified in ordering the Commission to dismiss the proceeding."

In view of the findings and evidence in this case, the dissenting judge must have had in mind, among others, this Respondent. For the evidence would not sustain a finding that this Respondent was a part of any national conspiracy to restrain price competition on sales of cement between states by agreement to sell on the "multiple basing point system" even if such a finding were made. The evidence establishes that this Respondent does not sell cement moving into other states (Fdgs., R. 15979; R. 1582-83); that its pricing methods were forced upon it by intense local competition, having no connection with interstate shipments or companies selling interstate, and there being no agreement or conspiracy involved (Fdgs., Par. 7(n), R. 16000; R. 3168–3195); and that where this Respondent has any contact with cement moving between states, the price competition is exceedingly sharp and prices are not determined by the so-called "multiple basing point system" (R. 3186-3251).

CONCLUSION

The decision below was based on the lack of findings and evidence of national conspiracy. No substantial question exists as to the correctness of this decision, and it involves no questions of general importance or application. If any question of law is presented, it goes no further than that already determined by this Court in the first Cement case.

Also, the decision below dismissing the case against this particular Respondent was required by the facts found and proved concerning it, and no substantial question, nor question of general importance, is presented by the decision below as to this company.

The petition for Writ of Certiorari as to Superior Portland Cement, Inc. should be denied.

Respectfully submitted,

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February 10, 1947.

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BRIEF FOR SUPERIOR PORTLAND CEMENT, INC.

HOLLY PRESS, SEATTLE

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